



**The Comptroller General
of the United States**

Washington, D.C. 20548

Kennerly

Decision

Matter of: American Mutual Protective Bureau

File: B-227875

Date: September 17, 1987

DIGEST

1. Allegation that Small Business Administration did not perform proper study of impact of 8(a) subcontract on incumbent small business is denied where impact study furnished by agency shows that proper study was made and that 8(a) decision is consistent with findings.

2. Section 8(a) subcontracting program is a noncompetitive procedure established by statute, and contracting agencies' broad discretion to determine appropriateness of 8(a) award is not limited by regulations on small business set-aside procurements.

DECISION

American Mutual Protective Bureau (AMPB), protests that the Army has improperly decided to contract with the Small Business Administration (SBA) under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), for guard services at the Oakland Army Base (OAB), Oakland, California. Section 8(a) authorizes SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. We deny the protest.

AMPB, the incumbent contractor for these services, argues that SBA did not properly perform a study to determine whether accepting the 8(a) award would have an adverse impact on AMPB, an individual small business. In this regard, SBA regulations provide that SBA will presume an adverse impact on small business concerns, and not accept a procurement for the 8(a) program, where a small business concern has been the recipient of two or more consecutive awards of the services within the last 24 months and the estimated dollar value of the award would be 25 percent or more of its most recent annual gross sales. 13 C.F.R. § 123.301(b)(8)(iv)(1987). AMPB states that it has been awarded two consecutive contracts for the guard services

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within the past 24 months and argues that the estimated dollar impact of the proposed OAB award exceeds 25 percent of its most recent annual gross sales. The firm thus maintains that SBA should have presumed adverse impact and not accepted this procurement for the 8(a) program.

SBA has provided our Office with a copy of the impact determination on AMPB. The determination indicates that due to AMPB's failure to provide SBA with current financial information, SBA could not determine that the dollar value of the OAB contract would be 25 percent or more of AMPB's most recent annual gross sales. Although, based on the information provided by the protester, SBA estimated "a possible adverse impact between 24.5 percent and 27.5 percent," the agency states that the most current financial statement provided by the protester was over 1 year old. Further, more current billing information provided by the protester was not reliable. For instance, SBA states that while AMPB reported billings for its OAB contract for calendar year 1986 to be \$1,520,103, when SBA sought to verify this amount with the Army, it learned that actual disbursements for that contract were several hundred thousand dollars less than AMPB reported. Also, although sales information on recent contracts awarded was requested from AMPB, the firm failed to advise SBA that it was awarded another guard contract in 1987 which, according to SBA, was a virtual replacement for the OAB contract. In this regard, SBA states that the protester's sales history indicated a strong upward growth and that review of the firm's financial history indicated that the firm was not dependent on the OAB contract to cover various operating costs. This indicated to SBA that the OAB contract would not have a 25 percent adverse impact. The SBA thus concluded that the loss of the OAB contract would have a minor impact on the firms and on June 11, 1987, SBA issued its finding of no adverse impact.

It is the function of the SBA, not this Office, to conduct impact studies to determine the extent to which accepting a requirement for the 8(a) program would adversely affect an individual small business. See IBI Security Service, Inc., B-228056, Sept. 2, 1987, 87-2 C.P.D. ¶ _____. Here, the record shows that SBA, in accordance with its regulations, conducted an impact study to determine whether accepting the OAB requirement in the 8(a) program would adversely affect AMPB, the small business incumbent contractor for the requirement. The record indicates that over a period of several months SBA solicited financial information from AMPB to determine the estimated dollar value of the OAB contract on AMPB's sales. Based on a lack of current and reliable financial information, the agency could not determine adverse impact under 13 C.F.R. § 124.301(b)(8)(iv).

The protester argues that the OAB contract exceeds 25 percent its annual gross sales and maintains that SBA's insistence that the firm provide detailed financial statements sooner than 60-75 days after the end of its fiscal year in March 1987, shows "biased insensitivity" on the part of SBA toward small business concerns such as AMPB. AMPB argues that if SBA had based its impact determination on the firm's most recent financial statement (provided to SBA after the agency issued its impact determination), SBA would have found adverse impact exceeding 27 percent.

The record indicates that SBA over a period of almost 4 months repeatedly requested current financial statements from the protester. SBA advised the protester that year-end statements were not necessary and that interim statements would suffice. The protester, however, did not provide financial statements, but instead wrote a letter to SBA stating that the OAB contract (unsupported by financial statements) "amounts to 34.61 percent of its total billings for 1986." Although the record shows that SBA both verbally and in writing repeated requests for a current financial statement and extended deadlines for AMPB to submit this information, it was not provided. In this regard, SBA, in its initial letter to AMPB, requesting financial statements, warned AMPB that failure to provide the requested information "would leave the agency no alternative but to accept the requirement under the 8(a) program." Based on this record, we cannot conclude that SBA acted in bad faith or deprived the protester a meaningful opportunity to show adverse impact under 13 C.F.R. § 124.301(b)(8)(iv).

Moreover, we note that the current contract for the guard services expired in July 1987 and, thus, prior to that date there was a need to proceed with preparations for the next year's requirements. The Army had advised SBA "time is most crucial and award must be made for work to commence on August 1, 1987." Accordingly, SBA could not continue to extend deadlines for AMPB to provide financial information.

AMPB also argues that SBA was required to base the impact determination on the information it actually provided to the agency and not rely on future projected sales from, for example, recently awarded contracts. The provisions of 13 C.F.R. § 124.301(b)(8)(iv) state that the impact determination is to be based on a small business concern's "most recent annual gross sales." It is clear here that the protester, after repeated requests by SBA, did not provide SBA with current verifiable sales information upon which the agency could make a reliable determination under the 25 percent rule in 13 C.F.R. § 124.301(b)(8)(iv). Thus, in making its impact determination, SBA relied on the financial position of the protester as well as sales information

provided which, as noted above, was not current. In our view, the SBA did not abuse its discretion performing the impact study based on the best information available.

AMPB alleges that the decision to accept the OAB contract in the 8(a) program was the product of significant congressional influence, and requests that our Office investigate this matter. The protester argues that SBA ignored its regulations to satisfy members of Congress who "pressured" SBA officials into accepting this requirement in the 8(a) program. In support of its allegation, the protester states that although SBA conducted the impact study on AMPB for almost 4 months, the agency issued a finding of "no adverse impact" immediately after it received inquiries from a member of Congress to whom the proposed 8(a) contractor served as "a former assistant and confidante."

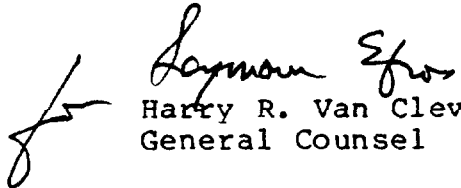
AMPB's allegations of political influence involve the above-discussed substantive protest that SBA did not perform a proper impact study prior to accepting the OAB contract in the 8(a) program, which we have considered and denied on the merits. See W.H. Compton, B-208626.6, Oct. 3, 1983, 83-2 C.P.D. ¶ 404. In any event, the protester has offered no proof supporting its allegations of undue political influence. The protester has the burden of proving its case and our Office will not conduct an investigation to establish whether a protester's speculative allegations are valid. See Commanche Natural Gas, Co., Inc., --Reconsideration, B-224314.2, Nov. 15, 1986, 86-2 C.P.D. ¶ 610.

Finally, AMPB alleges that the Army failed to follow applicable procurement regulations prior to restricting this procurement to an 8(a) firm. Specifically, the protester refers to the provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.506(a) (1986), which provide that "if before award of a contract involving a set-aside for small business, the contracting officer considers that the award to a small business concern would be detrimental to the public interest (e.g., because of unreasonable price) the contracting officer may withdraw the set-aside. . . ." FAR § 19.506(a) also requires the contracting officer to provide SBA with written notice stating the reasons for the withdrawal. The protester argues that the contracting officer improperly failed to provide written notice that withdrawal of the OAB contract from the small business set-aside program would be detrimental to the public interest.

The provisions of FAR § 19.506(a) apply to situations where the contracting officer, after conducting a small business set-aside, finds that award under the set-aside would not be in the public interest and seeks to dissolve the set-aside. Withdrawal of a set-aside as detrimental to the public

interest is not the issue here. Rather, the contracting activity instead has arranged to contract with SBA under section 8(a) of the Small Business Act. The contracting agency's authority to make such awards under section 8(a) which is expressly authorized by statute is not inconsistent with small business set-aside requirements. See RAI, Inc., B-222610, Aug. 5, 1986, 86-2 C.P.D. ¶ 156.

The protest is denied.


Harry R. Van Cleve
General Counsel